

BEFORE THE FEDERAL ELECTION COMMISSION

JAN 21 4 12 PM '99

In the Matter of)
)
) MUR 4357
Bob Barr for Congress '94 and Charles C. Black,)
as treasurer)

In the Matter of)
)
) MUR 4802
Bob Barr - Congress and Charles C. Black,)
as treasurer)

SENSITIVE

GENERAL COUNSEL'S REPORT

I. INTRODUCTION

MUR 4357 was generated by an audit of Bob Barr for Congress '94 (the "1994 Committee") and Charles C. Black, as treasurer, (collectively "Respondents") undertaken in accordance with 2 U.S.C. § 438(b). On August 19, 1997, the Federal Election Commission (the "Commission") found reason to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 2 U.S.C. § 441a(f) by accepting excessive contributions; 2 U.S.C. § 434(b)(3)(A) by failing to itemize contributions over \$200 and failing to disclose occupation and name of employer information; 2 U.S.C. §§ 434(b)(2) and 434(b)(4) by misstating financial activity; and 11 C.F.R. § 110.4(c)(2) by failing to promptly return the excessive amount of contributions of currency to contributors.

On August 24, 1998, the Office of General Counsel transmitted a brief to the Commission and to the 1994 Committee. The General Counsel's Brief recommended that the Commission find probable cause to believe that the violations occurred. After a 20-day extension of time to respond, the 1994 Committee submitted its response to the General Counsel's Brief on September 29, 1998. Attachment 1.

MUR 4802 was generated by an audit of Bob Barr - Congress (the "1996 Committee") and Charles C. Black, as treasurer, (collectively "Respondents") undertaken in accordance with 2 U.S.C. § 438(b). On August 27, 1998, the Commission found reason to believe that the 1996 Committee violated 2 U.S.C. § 441a(f) by accepting excessive contributions, 2 U.S.C. § 434(b)(3)(A) by failing to itemize contributions, and 2 U.S.C. § 434(a)(6) by failing to file 48-hour notices on 19 contributions for the primary election and 18 contributions for the general election. The Commission also authorized the Office of General Counsel to enter into conciliation prior to a finding of probable cause to believe with the 1996 Committee. On November 9, 1998, the Respondents submitted a response to the Factual and Legal Analysis. Attachment 2.

The alleged violations in MUR 4357 and MUR 4802 are similar in many respects. Therefore, this report contains a discussion of both matters and recommends that these matters proceed jointly.

II. ANALYSIS

A. MUR 4357

The General Counsel's Brief dated August 24, 1998 is incorporated herein by reference. In their brief, the Respondents acknowledge that many of the underlying facts are not in dispute, and essentially admit the violations. They argue, however, that the "violations alleged are ones of omission rather than commission, and can be traced back to technical bookkeeping and reporting errors." Attachment 1 at 3. The Respondents also state that they "have taken numerous steps to correct their internal situation to ensure compliance with the [Federal Election Campaign] Act and related regulations. The violations alleged have been corrected.

Respondents' reports have been amended where needed, and contributions refunded."¹ *Id.*

Respondents also expressed the view that there should be a conciliation of this matter prior to a probable cause finding. *Id.* at 1.

While it does not appear that the 1994 Committee committed knowing and willful violations pursuant to 2 U.S.C. §§ 437g(a)(5)(B) and 437g(d), the 1994 Committee did knowingly accept contributions prohibited by the contribution limitations of 2 U.S.C. § 441a(a). 2 U.S.C. § 441a(f). Moreover, contrary to the respondents' assertions, the violations by the 1994 Committee are more than mere technical violations. For example, the 1994 Committee accepted excessive contributions amounting to \$40,804, which was 8% of the total amount of contributions, and failed to provide any written documentation of efforts to contact the contributors regarding the possible reattribution or redesignation of those contributions. 11 C.F.R. §§ 103.3(b)(3) and 110.1(k)(3)(i). Furthermore, on \$45,683 or 33% of contributions that were required to be itemized, the 1994 Committee failed to disclose the occupation and name of employer of such contributors, and failed to provide any documentation of efforts to obtain such information. 11 C.F.R. § 104.7(b)(2).

Thus, the Respondents' arguments appear to be more appropriate toward mitigation than to support a finding of no probable cause to believe that violations occurred or a decision to take no further action. Therefore, the Office of General Counsel recommends that the Commission find probable cause to believe that the Respondents violated the Federal Campaign Election Act, as amended, by accepting excessive contributions, failing to itemize contributions over \$200,

¹ The Committee's assertion regarding amended reports is not totally accurate. See discussion under Section II.D., *infra*.

failing to promptly return excessive cash contributions, misstating financial activity, and failing to disclose contributors' occupations and names of employers.

1. Excessive Contributions

Respondents argue that the Commission should not find probable cause to believe that the 1994 Committee violated 2 U.S.C. § 441a(f) by accepting excessive contributions because the General Counsel's Brief did not identify the contributions that were excessive by name and date, and did not "differentiate between contributions which were excessive, and those for which written reattributions or redesignations were not obtained." Attachment 1 at 4. Furthermore, Respondents contend that \$15,500 of the \$40,804 in excessive contributions were caused by a failure to obtain written redesignations or reattributions, and not the acceptance of excessive contributions prohibited by 2 U.S.C. § 441a(f). *Id.*

The General Counsel's Brief identified the number and the total amount of excessive contributions, and the number and amount of contributions that were improperly reattributed and redesignated. General Counsel's Brief at 2-3. Although the General Counsel's Brief may not have itemized in detail the excessive contributions, the 1994 Committee had previously received a schedule of the excessive contributions to the 1994 Committee at the audit exit conference, and as an attachment to the Audit Report.

While the 1994 Committee made efforts to contact contributors who made excessive contributions, there was no written documentation of those telephone conversations, as required by 11 C.F.R. § 103.3(b)(3). Furthermore, the 1994 Committee did not, within the appropriate time period, obtain written authorization from contributors to reattribute or redesignate contributions as required under 11 C.F.R. § 103.3(b)(3). *See* General Counsel's Brief at 5. Because the contributions were not properly redesignated or reattributed, or were not refunded

within 60 days of receipt by the 1994 Committee, those contributions are considered excessive contributions. 2 U.S.C. §§ 441a(a)(1) and 441a(f); 11 C.F.R. § 110.1(b).

Furthermore, the Respondents seem to suggest that the General Counsel's probable cause recommendation with respect to excessive contributions is based primarily on the written notations on the checks or contributor forms involving six contributions. Attachment 1 at 5-6. However, the General Counsel's recommendation for probable cause is based on more than those notations; rather, it is based on the 1994 Committee's acceptance of 62 excessive contributions and the failure to refund them or obtain a proper reattribution or redesignation. Accordingly, this Office recommends that the Commission find probable cause to believe that the Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 2 U.S.C. § 441a(f) by accepting excessive contributions totaling \$40,804.

2. Itemized Reporting of Contributions

The Respondents argue that the Commission should not find probable cause to believe that the 1994 Committee violated 2 U.S.C. § 434(b)(3)(A) by failing to itemize contributions because the General Counsel's Brief does not identify contributions that were not itemized. The Respondents also claim that the "contributions were lawful; it is merely the failure to itemize that is at issue." Attachment 1 at 7. Furthermore, Respondents contend that such contributions were not excessive but "presumably such contributions only exceeded the \$200 itemization threshold, and not the \$1,000 limit." *Id.*

The General Counsel's Brief states the number of unitemized contributions that were excessive, and the excessive amount of such contributions. General Counsel's Brief at 6. Moreover, the excessive contributions that were not itemized were previously identified for the

1994 Committee at the audit exit conference, and such information was attached to the Audit Report.

The 1994 Committee did not itemize on its disclosure reports 14 contributions totaling \$18,100, which were in whole or in part excessive. 2 U.S.C. § 434(b)(3)(A). In some instances, the excessive contributions were reported as part of the total amount of unitemized contributions or reported in amounts less than the actual contribution. *Id.* Accordingly, the Office of General Counsel recommends that the Commission find probable cause to believe that the 1994 Committee violated 2 U.S.C. § 434(b)(3)(A) by failing to itemize contributions over \$200.

3. Excessive Contributions of Currency

The Respondents argue that the Commission should not find probable cause to believe that the 1994 Committee violated 11 C.F.R. § 110.4(c)(2) by failing to promptly refund excessive cash contributions because the “applicable regulation makes no reference to election day, nor does it define ‘promptly.’” Attachment 1 at 7. 11 C.F.R. § 110.4(c)(2). As noted in the General Counsel’s Brief, the refunds of the excessive cash contributions were made 14 months after the election. General Counsel’s Brief at 6 and 7.

The regulation does not define the term “promptly,” and its meaning in this context does not appear to have been previously considered by the Commission. However, it can be argued by analogy that such refunds should be returned no later than 60 days from the date of receipt of such funds, which is the requirement for other excessive contributions. *See* 11 C.F.R. § 103.3(b)(3). Generally, the purpose of a time period for returning excessive contributions is to give the committee a reasonable amount of time to review its records and to contact the contributors. In the case of excessive cash contributions, a strong argument can be made that an extended period of time to review such contributions is not necessary. Thus, the 1994

Committee's refund of excessive cash contributions in January 1996, which was 14 months after the election, is certainly not prompt by any reasonable standard. Therefore, the Office of General Counsel recommends that the Commission find probable cause to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 11 C.F.R. § 110.4(c)(2) by failing to refund promptly contributions of currency over \$100.

4. Misstatement of Financial Activity

The Respondents argue that the Commission should not find probable cause to believe that the 1994 Committee violated 2 U.S.C. §§ 434(b)(2) and 434(b)(4) by misstating financial activity because the 1994 Committee amended its reports and materially corrected the public record. Attachment 1 at 8. The 1994 Committee understated its 1993 receipts by \$4,439 and understated its 1993 disbursements by \$3,549. 2 U.S.C. §§ 434(b)(2) and 434(b)(4). Although the 1994 Committee filed amended reports, the amended reports contained the same, erroneous total reported receipts and disbursements.² General Counsel's Brief at 7. Thus, contrary to its assertion, the 1994 Committee has not materially corrected the public record with respect to the 1993 year end report. Accordingly, the Office of General Counsel recommends that the Commission find probable cause to believe that the 1994 Committee violated 2 U.S.C. §§ 434(b)(2) and 434(b)(4) by understating its 1993 receipts by \$4,439 and understating its 1993 disbursements by \$4,376.

5. Disclosure of Occupation and Name of Employer

Respondents admit that they "may not have adhered to the strict mandates of 11 C.F.R. § 104.7 [the best efforts provision]," but argue that there should be no probable cause finding for

² As of January 19, 1999, the Committee still has not amended the 1993 year end report to correct the understatement of receipts and disbursements.

violating 2 U.S.C. § 434(b)(3)(A) by failing to disclose the occupation and the name of employer of contributors who contributed more than \$200 to the 1994 Committee because the "General Counsel's brief overstates the facts and misstates the law." Attachment 1 at 8. Specifically, the Respondents argue that all contributors were identified by name, and that the term "self employed small business owner" satisfies the requirement that the occupation and the name of the employer of the contributor be identified.

The Act provides a safe harbor for committees with respect to information to be obtained from contributors. Specifically, "when the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be in compliance with this Act." 2 U.S.C. § 432(i). To implement this provision of the Act, the Commission's regulations state that the treasurer must make at least one effort, within thirty days after receipt of the contribution, to obtain the information, and such effort shall consist of "either a written request sent to the contributor or an oral request to the contributor documented in writing." 11 C.F.R. § 104.7(b)(2). The 1994 Committee did not submit any documentation, such as written requests to the contributors or oral requests to the contributors documented in writing, of its efforts to obtain the information required by the Act. 2 U.S.C. §§ 431(13)(A), 434(b)(3)(A) and 432(i). General Counsel's Brief at 8-9. Thus, the 1994 Committee may not avail itself of the safe harbor provision. Moreover, as the Commission noted in the Explanation and Justification for 11 C.F.R. § 104.7(b), any concerns that some contributors may have about identifying their home addresses, occupations and employers must be "evaluated in light of the high priority the [Federal Election Campaign Act] places on the public interest in the disclosure of accurate and complete contributor information." 58 Fed. Reg. 57726 (October 27, 1993). The

term "self employed small business owner" does not satisfy the requirements of 11 C.F.R. § 104.7(b) because the name of the business is not identified, and it results in the 1994 Committee failing to provide complete contributor information. Accordingly, the Office of General Counsel recommends that the Commission find probable cause to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 2 U.S.C. § 434(b)(3)(A) by not disclosing occupation and name of employer information.

B. MUR 4802

The First General Counsel's Report dated August 21, 1998 is incorporated herein by reference. In their response to the Factual and Legal Analysis, the Respondents state that they are "interested in pursuing pre-probable cause conciliation in this matter, but disagree with portions of the Factual and Legal Analysis." Attachment 2 at 1. The Commission authorized the Office of General Counsel to enter into conciliation prior to a finding of probable cause to believe. Furthermore, Respondents repeat their argument contained in their response to the interim audit report that the violations are ones of "omission rather than commission." *Id.* Finally, Respondents argue that "the [1996] Committee has already taken major corrective steps to ensure that all past mistakes have been corrected and that future ones do not occur." *Id.*

1. Excessive Contributions

Respondents argue that "most of the specific allegations contained in the [Factual and Legal] Analysis can be traced back to the failure to obtain written designations and reattributions." Attachment 2 at 2. Furthermore, Respondents state that "although the Committee mailed redesignation and reattribution forms or otherwise attempted to contact virtually all the contributors at issue, it failed to maintain records of such mailings and efforts." *Id.* Finally, Respondents argue that "failure to detect these excessive contributions was due to a

data management failure that could not keep up with the volume of contributions, and “this situation has been corrected.” *Id.* at 3.

The 1996 Committee accepted excessive contributions totaling \$52,971, which was approximately 8% of the dollar amount of all contributions from individuals. First General Counsel’s Report at 4. During the 1996 election cycle, the Commission’s Reports and Analysis Division sent numerous inquiries to the 1996 Committee regarding the 1996 Committee’s acceptance of excessive contributions. First General Counsel’s Report at 5. Thereafter, the 1996 Committee amended its disclosure reports to reflect the reattribution of 24 contributions totaling \$22,700 and the redesignation of 19 contributions totaling \$17,970, but it did not obtain written authorizations for the reattributions and redesignations as required under 11 C.F.R. §§ 110.1(b)(5)(ii) and 110.1(k)(3)(ii). *Id.* Because the contributions were not properly redesignated or reattributed, or were not refunded within 60 days of receipt by the 1996 Committee, those contributions are considered excessive contributions. 2 U.S.C. §§ 441a(a)(1) and 441a(f); 11 C.F.R. § 110.1(b).

2. Itemized Reporting of Contributions

Respondents argue that the “\$7,945 at issue constitutes less than one percent of the [1996] Committee’s total receipts” and the failure to itemize the contributions “were caused by the [1996] Committee’s data management shortcomings and these shortcomings have been corrected.” Attachment 2 at 4. Nevertheless, the contributions were not itemized in accordance with 2 U.S.C. § 434(b)(3)(A).

3. Failure to File Forty-Eight Hour Notices

Respondents state that “the [1996] Committee has conceded that it should have filed 48-hour notices.” Attachment 2 at 4. Furthermore, Respondents state that “because Congressman

Barr was unopposed [in the primary election], the [1996] Committee assumed that such notices were not needed." *Id.* With respect to the general election, Respondents state that "the [1996] Committee's inability to keep up with the volume of contributions apparently affected its 48-hour reports as well." Attachment 2 at 5.

Nevertheless, the amounts that were not reported were significant. There were 19 contributions on six days totaling \$29,804, deposited between June 20, 1998 and July 6, 1996, that required 48-hour notices. Moreover, there were 18 contributions on nine days totaling \$20,000, deposited between October 17, 1996 and November 2, 1996, that required 48-hour notices.

III. DISCUSSION OF JOINT CONCILIATION AGREEMENT AND CIVIL PENALTY

If the Commission approves the recommendations relating to MUR 4357, this Office would like to attempt a joint conciliation agreement with respect to MUR 4357 and MUR 4802 because there are similar violations in both matters. Thus, this Office also recommends that the Commission approve the attached joint conciliation agreement with Bob Barr for Congress '94 and Charles C. Black, as treasurer, and Bob Barr - Congress and Charles C. Black, as treasurer

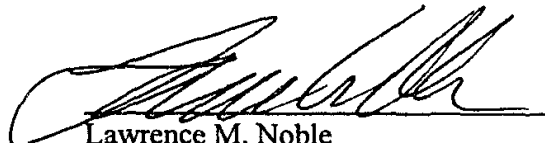
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IV. RECOMMENDATIONS

1. Find probable cause to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 2 U.S.C. § 441a(f) by accepting excessive contributions;
2. Find probable cause to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 2 U.S.C. § 434(b)(3)(A) by not itemizing contributions over \$200;
3. Find probable cause to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 11 C.F.R. § 110.4(c)(2) by not promptly returning the excessive amount of contributions of currency to contributors;
4. Find probable cause to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 2 U.S.C. §§ 434(b)(2) and 434(b)(4);
5. Find probable cause to believe that Bob Barr for Congress '94 and Charles C. Black, as treasurer, violated 2 U.S.C. § 434(b)(3)(A) by not disclosing occupation and name of employer information;
6. Approve the attached joint conciliation agreement with Bob Barr for Congress '94 and Charles C. Black, as treasurer, and Bob Barr - Congress and Charles C. Black, as treasurer; and
7. Approve the appropriate letters.

Date

1/21/99



Lawrence M. Noble
General Counsel

Attachments

1. Respondents' Brief in MUR 4357 dated September 29, 1998
2. Response to Factual and Legal Analysis in MUR 4802 dated November 9, 1998
3. Proposed Joint Conciliation Agreement

Staff Person: Delbert K. Rigsby